Supreme Court, U.S.
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NO. 91-1756

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KEVIN BAILEY,

PETITIONER,

vs.

BETTY R. KEEP, KEEPHOLM FARM

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE REQUIREMENT THAT THE PETITIONER EXHAUST THE AVAILABLE ADMINISTRATIVE REMEDIES PRIOR TO SEEKING JUDICIAL REVIEW IS IN VIOLATION OF DUE PROCESS?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Kevin Bailey, the petitioner, Betty R. Keep, Keepholm Farms and the Industrial Commission of Ohio.

REASONS FOR DENYING THE WRIT

Petitioner has requested that this Court review a determination of the Supreme Court of Ohio. This determination held that before court review of an administrative decision can occur, the person seeking such review must first exhaust the available administrative remedies.

This Court should decline to review this case because the decision sought to be reviewed involves a question as to whether the state court properly applied a state statute to the facts of the case. It is submitted that no procedural nor substantive due process rights are implicated in this decision. The state court in its decision neither decided a federal question in a manner in conflict with another court nor did the state court decide an important federal question undecided by this Court.

Petitioner was injured in the course of and arising out of his employment. Petitioner applied for and received benefits under the workers' compensation laws of the State of Ohio. Thereafter, Petitioner applied for an additional award for the violation of a specific safety requirement.

Compensation for specific safety requirement violations under the state workers' compensation system is based on Article II, Section 35 of the Ohio Constitution. This provision vests exclusive jurisdiction in the Industrial Commission of Ohio to determine specific safety requirement violations and provides in pertinent part that the Industrial Commission has " . . . full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees . . . and its decision shall be final."

Recovery of an award for violation of a specific safety requirement is predicated upon proof of a violation and a casual connection between the violation and injury. *State, ex rel. Watson v. Industrial Commission,* 29 Ohio App. 3d

354, 505 N.E. 2d 1015 (1986). As an award of this nature is in the form of a penalty against the employer, the specific safety requirements are subject to strict construction. See, *State, ex rel. Sanchez v. Industrial Commission,* 18 Ohio St. 3d 46, 479 N.E. 2d 864 (1985). Further, the specific safety requirements must be drafted in a manner which will forewarn the employer and clearly establish a standard which must be followed. *State, ex rel. Howard Engineering and Manufacturing Company v. Industrial Commission,* 148 Ohio St. 165, 74 N.E. 2d 201 (1947).

As noted by the state supreme court:

> The term, 'specific requirement' as used in Art. II, §35 of the constitution of Ohio, does not comprehend a general course of conduct or general duties or obligations flowing from the relationship of employer and employee, but embraces such lawful, specific and definite requirements or standards of conduct as are prescribed by statute or by orders of the industrial commission, and which are of a character plainly to apprise an employer of his legal obligation toward his employees.

State, ex rel. Trydle v. Industrial Commission, 32 Ohio St. 2d 257, 291 N.E. 2d 748 (1972); *State, ex rel. Holdosh v. Industrial Commission,* 149 Ohio St. 179, 78 N.E. 2d 165 (1948). Accordingly, courts have declined to apply the safety requirements of one industry to that of another. See, *State, ex rel. Sorrells v. Mosier Tree Service,* 69 Ohio St. 2d 341, 432 N.E. 2d 197 (1982).

In the instant, case an administrative hearing officer determined that a specific safety requirement violation had not occurred and denied the application for an additional award. The determination of the hearing officer also apprised Petitioner that he could seek a rehearing pursuant to rule 4121-3-20(G) of the Ohio Administrative Code.

Petitioner did not seek a rehearing. Instead, he filed an action in mandamus in the Court of Appeals of Ohio, Tenth Appellate District.

The state supreme court held that Petitioner must first exhaust his available administrative remedies, in this case a motion for rehearing, prior to seeking court intervention.

The exhaustion of administrative remedies mandates "that absent compelling circumstances, the avenues nearest and simplest should be pursued first." *Moore v. City of East Cleveland,* 431 U.S. 494 (1977). In the instant case Petitioner offers no compelling circumstances for his failure to pursue his administrative remedies. Therefore, relief was properly denied.

Conclusion

Petitioner has failed to demonstrate the manner in which a state court's determination of the applicability of a state statute implicates an important federal question. Accordingly, the petition for writ of certiorari must be denied.

Respectfully submitted,

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